



The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference

Volume 81 (2019)

Article 7

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Citation Information

Kiyani, Asad G.. "R. v. Lloyd and the Unpredictable Stability of Mandatory Minimum Litigation." *The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference* 81. (2019).
<https://digitalcommons.osgoode.yorku.ca/sclr/vol81/iss1/7>

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***R. v. Lloyd* and the Unpredictable Stability of Mandatory Minimum Litigation**

Asad G. Kiyani*

I. INTRODUCTION

The adjudication of the constitutionality of mandatory minimum sentences by the Supreme Court of Canada presents a contradictory message. On the one hand, cases challenging the constitutionality of mandatory minimum sentences appear before the Court on a seemingly annual basis. On the other hand, the actual treatment of those cases is anything but routine, presenting divergent and at times contradictory messages within the narrow range of mandatory minimum sentences jurisprudence, sentencing law more generally, and the definition of Charter rights broadly speaking. The Court's decision in *R. v. Lloyd*¹ is the latest iteration in this line of cases, clarifying and confusing the state of the law in the best traditions of Charter adjudication.

This article considers three dimensions of this mercurial jurisprudence, outlining the current state of the law, its relationship to prior case law, and implications for future decisions. The second part of the article addresses the general signal sent by the Court to Parliament on its design of mandatory minimum sentencing regimes. The Court has been clear that Parliament can Charter-proof mandatory minimum sentences by crafting statutory provisions in more narrow terms, or granting judges the statutory authority to deviate from mandatory minimums in certain cases. However, the first of these propositions is challenged by *Lloyd*, in which a narrowly-drafted provision is ruled unconstitutional. The second represents an unexpected departure from strong policy-based arguments presented in previous cases.

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¹ [2016] S.C.J. No. 13, 2016 SCC 13, [2016] 1 S.C.R. 130 (S.C.C.) [hereinafter "*Lloyd*"].

The third part of this article situates *Lloyd* in the context of its predecessor *R. v. Nur*,² outlining the basic test to be applied. While the Court in *Lloyd* purports to merely apply *Nur*, it takes an important but under-acknowledged step in its construction of one of the reasonable hypotheticals used by incorporating offender-specific characteristics into its analysis. This novel step illustrates a growing fissure in the Court's jurisprudence on mandatory minimums, whereby the majority and dissenting justices differ on their interpretation of the basic parameters by which a reasonable hypothetical is to be constructed.

Having outlined these preliminary positions, the fourth part of the article looks at the future of mandatory minimum sentences, and makes three claims. First, it addresses the likelihood that *Lloyd* makes it easier than ever to defeat mandatory minimum sentences. The post-*Lloyd* case law is unclear on this point, and observers should be neither overly optimistic nor pessimistic about the future of mandatory minimum sentences given the inconsistencies in lower court decisions. Second, it argues that *Lloyd* may make it harder for courts to find a section 12³ violation given the Chief Justice's explicit connection of *Lloyd* to *R. v. Lacasse*, which confirms that section 718.2(e)⁴ and *Gladue*⁵ principles are not part of the analysis under section 12. The rejection of 'proportionality' as a principle of fundamental justice and the concretization of 'gross disproportionality' thus gives little scope for lower courts to incorporate certain fundamental principles of sentencing into section 12 analyses.

Finally, this fourth part of the article examines the impact of this ruling on substantive equality concerns, and the Court's general avoidance of substantive equality arguments even where concerns such as race seem obvious on the facts of the case. To the extent that mandatory minimum sentences are declared of no force and effect under section 52(1) of the *Constitution Act, 1982*,⁶ it appears that enumerated or analogous grounds under section 15 of the Charter will have little role to play in those decisions. In fact, the ongoing exclusion of substantive equality considerations from section 12 jurisprudence makes it less likely that a particular mandatory minimum sentence will be declared invalid. Arguments that section 12 can be integrated with section 15 in a

² [2015] S.C.J. No. 15, 2015 SCC 15, [2015] 1 S.C.R. 773 (S.C.C.) [hereinafter "*Nur*"].

³ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter "Charter"].

⁴ *Criminal Code*, R.S.C. 1985, c. C-46.

⁵ *R. v. Gladue*, [1999] S.C.J. No. 19, [1999] 1 S.C.R. 688 (S.C.C.) [hereinafter "*Gladue*"].

⁶ (U.K.), 1982, c. 11.

meaningful way are hindered by recent judicial changes in the construction of proportionality for the purposes of section 12 review; the decisions in *Lloyd* and *Safarzadeh-Markali*⁷ are both questionable and yet consistent.

The article ultimately concludes that reactions to *Lloyd* are both premature and overbroad. The future of mandatory minimum sentences remains relatively opaque: they are here to stay for some time and for at least some offences, but likely not all offences for which they have been imposed. While *Lloyd* has opened up the terms on which reasonable hypotheticals might be challenged, it has also suggested a number of constraints remain. In particular, those of the view that *Lloyd* heralds the automatic end of mandatory minimums ought to consider the lack of attention paid to section 15 substantive equality grounds. The unwillingness of the Court to recognize race as a feature in reasonable hypotheticals avoids an outcome which would virtually guarantee the end of mandatory minimum sentences for at least some offences. Thus, while *Lloyd* refines the Court's treatment of mandatory minimum sentences, its expansionist approach to reasonable hypotheticals stops well short of planting a self-destruct button in that jurisprudence.

II. MESSAGING TO PARLIAMENT: EXEMPTIONS & DRAFTING

Two threads have consistently presented themselves in mandatory minimum sentences jurisprudence. First, the Court has continually warned Parliament about how mandatory minimum legislation is drafted, asking for the provisions to be defined more narrowly. Second, the Court has struggled with the idea of using judicially-granted exemptions to preclude the application of mandatory minimum sentences in appropriate cases.

In *Lloyd*, the Court suggested a statutory exemption scheme as another option for insulating mandatory minimum sentences.⁸ This “residual judicial discretion” was described as “a safety valve” that would allow judges the ability to grant a lesser sentence in “exceptional cases”.⁹ As the Court notes, such schemes do appear in numerous other jurisdictions, and observers will also note that no parameters were explicitly placed on Parliament's discretion in designing such a scheme. Thus, it might be a general statutory

⁷ *R. v. Safarzadeh-Markhali*, [2016] S.C.J. No. 14, 2016 SCC 14, [2016] 1 S.C.R. 180 (S.C.C.) [hereinafter “*Safarzadeh-Markhali*”].

⁸ *Supra*, note 1, at para. 36.

⁹ *Id.*

exemption that applied to a range of offences to which mandatory minimum sentences attached,¹⁰ or it might take the form of an exemption attached to every mandatory minimum. The latter has the benefit of allowing Parliament to specify the criteria for exercising judicial discretion in respect of any given offence, whilst also allowing certain minimums to be automatically excluded from the statutory exemption scheme.

While some commentators have argued in favour of adopting an exemption-based model,¹¹ others have suggested that the statutory discretion scheme briefly described in *Lloyd* is functionally the same as the constitutional exemption concept rejected in *Ferguson*,¹² and thus vulnerable to at least some of the same critiques as the Chief Justice had deployed in that case.¹³ Parliament can reap the political benefits of appearing tough-on-crime whilst the judiciary bogs itself down in appeals sorting out when exemptions might be appropriate (and then, invariably, being criticized as judicial activists for handing them out in a way that undermines the tough-on-crime intent of Parliament). A number of the examples referred to by the Court in *Lloyd* provide little statutory guidance on their face.¹⁴ If part of the pressing rationales in *Ferguson* were to insist Parliament take ownership of its role as the designer of the sentencing system, and to generate predictability in sentencing, a statutory exemption scheme does little to assure those outcomes.

¹⁰ Former Minister of Justice and Attorney General Irwin Cotler proposed just such a provision in 2015 that applied to all mandatory minimum sentences. See Bill C-669, *An Act to amend the Criminal Code (independence of the judiciary)*, 2nd Sess, 41st Parl., 2015 (introduction and first reading April 24, 2015).

¹¹ P. Sankoff, "Constitutional Exemptions: An Ongoing Problem Requiring a Swift Resolution" (2003) 36 U.B.C. L. Rev. 231-258, at 233 (referring to the difference between a constitutional exemption that is offered during a suspended declaration of invalidity, such as that offered to those who sought to benefit from a change to the prohibition against assisted-dying in *Carter v Canada*, [2015] S.C.J. No. 5, 2015 SCC 5, [2015] 1 S.C.R. 331 (S.C.C.) and ongoing exemptions that are applied intermittently in perpetuity because the implicated law is not in fact declared invalid).

¹² *R. v. Ferguson*, [2008] S.C.J. No. 6, 2008 SCC 6, [2008] 1 S.C.R. 96 (S.C.C.) [hereinafter "*Ferguson*"].

¹³ D. Stuart, "Pragmatism and Inconsistency from the Supreme Court on Mandatory Minimums" (2016) 27 *Criminal Reports* (7th) 245 [hereinafter "*Stuart*"].

¹⁴ See, e.g., ss. 86E, 102 and 103 of the *Sentencing Act, 2002* (NZ), 2002/9 where variance from the minimum penalty for murder is permitted if the minimum penalty would be "manifestly unjust", or if the court gives reasons for its decision not to apply life imprisonment; s. 53(1)(a) of the *Criminal Law Amendment Act, 1997* (S Afr), No 105 of 1997 permits a variance where the Court records its "substantial and compelling reasons"; ss. 109(3), 110(2) and 111(2) of the *Powers of Criminal Courts (Sentencing) Act 2000* (U.K.), c. 6, which permit variance from mandatory minimums for murder, certain drug trafficking offences, and a third burglary conviction if the court states for the record the "exceptional circumstances" or "particular circumstances" in the case.

At the same time, the fact that an exemption would be incorporated by statute and not the extraordinary reliance upon questionable judicial interpretations of sections 24(1) and 52(1) powers mitigates a number of the criticisms. The formalization of discretion through statutorily-prescribed exemptions reduces the sense of judicial activism that would otherwise arise, and lends some predictability as case law develops under the ambit of exemptions. Predictability may not be perfect, but it has never been so in sentencing; to reject a scheme because of its lack of certainty would be to discard wholesale the principles of individualization of punishment.

The other way in which *Lloyd* sends a clear signal to Parliament on statutory design is detached from the question of exemptions: "...If Parliament hopes to sustain mandatory minimum penalties for offences that cast a wide net, it should consider narrowing their reach so that they only catch offenders that merit the mandatory minimum sentences."¹⁵ Here the Court builds on its minimal impairment arguments in *Nur*,¹⁶ pushing for more careful attention to be paid to the design not of exemptions but of the sentencing provisions themselves. If Parliament is unwilling to adopt an exemption scheme for fear that it would lead to exemptions becoming the norm, then it must create sentencing provisions that are narrowly-defined and restrictive in their scope. At the time of writing, Parliament's response to *Lloyd* and the rise in the number of mandatory minimum sentences remains uncertain.¹⁷

III. THE REASONABLE HYPOTHETICAL TEST IN *NUR* AND *LLOYD*

1. Loose Drafting Defined

The problem that has been set for Parliament is determining how narrowly a statute must be drafted in order to satisfy the Court's directions. The statements of the majority in *Lloyd* must be compared with the actual reasoning in the case, in which the Court used

¹⁵ *Supra*, note 1, at para. 35.

¹⁶ *Supra*, note 2, at para. 117: "Parliament could have achieved its objective by drafting an offence with a close correspondence between conduct attracting significant moral blameworthiness ... and the mandatory minimum, rather than a sweeping law...".

¹⁷ Minister of Justice Jody Wilson-Raybould has promised an all-encompassing review of the *Criminal Code*, including mandatory minimum sentences, but no concrete reforms have been undertaken. See, e.g., "Liberals Eye Changes to Mandatory Minimum Sentences", *Canadian Press* (May 7, 2017), online: <www.cbc.ca/news>.

“reasonable hypotheticals” to rule unconstitutional the mandatory minimum sentences attached to what appeared to be the fairly narrowly drafted prohibitions of section 5(3)(a)(i)(D) of the *Controlled Drugs and Substances Act*.¹⁸ The Chief Justice’s own summary of the offence illustrates the specificity:

To be subject to the mandatory minimum sentence of one year of imprisonment, an offender must be convicted of trafficking, or of possession for the purpose of trafficking, of either any quantity of a Schedule I substance, such as cocaine, heroin or methamphetamine, or three kilograms or more of a Schedule II substance, namely cannabis: s. 5(3)(a) and (a.1), *CDSA*. The offender must also have been convicted within the previous 10 years of a ‘designated substance offence’, which is defined at s. 2(1) of the *CDSA* as any offence under Part I of the *CDSA* other than simple possession.¹⁹

As the dissenting judges noted, the prohibition appears quite particular:²⁰ confined to traffickers of either the most serious drugs,²¹ or of large quantities of less serious drugs, who had been convicted of trafficking, importing, exporting or producing a drug within the previous decade. That the majority nonetheless found the provision to run afoul of repeated admonitions to Parliament to draft offences as narrowly as possible points to the difficulty facing legislators in this area.

The legislation was found to apply to a great deal of offenders who might represent a wide range of blameworthiness. For all its specificity, the provision treated those who traffick for profit the same as those addicts who possess much smaller amounts for sharing in more intimate circumstances: with friends, spouses, and other addicts.²² The finding of broad applicability also turned in part on the broad definition of “trafficking” under the *CDSA* which includes not just those who sell drugs, but those who “give”, “send”, “transfer” or “deliver” drugs. While the delivery of drugs, for example, is no doubt integral to the trafficking operation of the “professional drug dealer”, McLachlin C.J.C. notes that the definition of trafficking does not include considering the motive of the individual or their intent to profit from their trafficking.²³ Finally, the “designated substance offence” lumps a

¹⁸ S.C. 1996, c. 19 [hereinafter “*CDSA*”].

¹⁹ *Lloyd, supra*, note 1, at para. 6.

²⁰ *Id.*, at para. 102.

²¹ Schedule I to the *CDSA* includes drugs such as heroin, cocaine, methamphetamines, and fentanyl.

²² *Lloyd, supra*, note 1, at para. 29.

²³ *Id.*, at para. 30.

broad range of conduct together, including the CDSA's core prohibitions against importing, exporting, producing, trafficking or obtaining prohibited substances.²⁴ Thus a provision that appears at first sight to be quite specific may not actually be so narrow or constrained.

The majority's finding of breadth within section 5(3)(a)(i)(D) might be criticized for demanding too much of Parliament through its close editorial supervision of the statute, as the dissent in *Lloyd* suggests. However, it might also fairly be understood as an indication from the majority that the complexity of a statutory provision does not equate to adequate specificity for the purposes of section 12 of the Charter. That the provision could have been phrased more broadly (for example, by including simple possession as a designated substance offence, or by removing the 10-year period for the prior conviction) does not mean that it has been phrased in sufficiently narrow terms. When determining the breadth of a mandatory minimum sentence, judges ought to work out the full implications of the relevant prohibition(s).

2. General Parameters of Reasonable Hypotheticals

Part of working through the full implications of the prohibition is testing the breadth of not just the conduct it captures, but the circumstances it captures and subjects to the mandatory minimum sentence. To this end, the natural progression in the section 12 analysis has become to construct a reasonable hypothetical — an offender in some fact-specific situation — that can test the law.

In doing this, the Court in *Lloyd* relied on the section 12 test established in a series of cases and most clearly articulated in *Nur*:

[A] challenge to a mandatory minimum sentencing provision on the ground it constitutes cruel and unusual punishment under s. 12 of the *Charter* involves two steps. First, the court must determine what constitutes a proportionate sentence for the offence having regard to the objectives and principles of sentencing in the *Criminal Code*. Then, the court must ask whether the mandatory minimum requires the judge to impose a sentence that is grossly disproportionate to the fit and proportionate sentence. If the answer is yes, the mandatory minimum provision is inconsistent with s. 12 and will fall unless justified under s. 1 of the *Charter*.²⁵

²⁴ The “designated substance offences” of ss. 4-10 are the “true crime” provisions of the CDSA, but the Act does contain other offences (such as s. 43, for a breach of an administrative order under Part V of the CDSA).

²⁵ *Supra*, note 2, at para. 46.

The second step of the *Nur* test itself contains two stages. First, the court must consider whether it is obligated by the mandatory minimum sentence to impose a grossly disproportionate sentence to the specific offender before it, having due regard to the factors ordinarily considered as part of fashioning a fit and proportionate sentence. In addition, the sentencing or reviewing court also has the authority to consider constitutional challenges to legislation even in situations where the law itself did not violate the rights of the particular offender opposing the law.²⁶ In this second stage, the court may consider a “reasonable hypothetical” in which the imposition of the mandatory minimum “would be grossly disproportionate in reasonably foreseeable cases.”²⁷ These cases cannot be “marginally imaginable” or “far-fetched”; they must reflect “a situation that may reasonably be expected to arise”.²⁸

There is no requirement for provincial courts to engage in the second stage of the test, but the Court in *Lloyd* clarified that they are permitted to do so (whilst lacking the power to declare the law of no force and effect under section 52(1) of the *Constitution Act, 1982*).²⁹ Superior courts clearly have the same ability, as well as the added power of applying section 52(1), but it is not clear that they are obligated to consider reasonable hypotheticals.³⁰ Nonetheless, the Supreme Court has done so in every situation presented before it, and the growing use of reasonable hypotheticals by trial courts suggests that all reviewing courts will invariably engage in the analysis of “reasonable hypotheticals”.

Whether or not a court chooses to apply the entirety of the test, the turn to a “reasonable hypothetical” should not automatically lead to findings of unconstitutionality. According to the majority in *Nur*, it “set a

²⁶ Drawing on the statement of Dickson C.J.C. in *R. v. Big M Drug Mart Ltd.*, [1985] S.C.J. No. 17, [1985] 1 S.C.R. 295 at 314, 18 D.L.R. (4th) 321 (S.C.C.) that “[i]t is the nature of the law, not the status of the accused, that is in issue” in s. 52 claims. In the specific context of mandatory minimums, see *Ferguson, supra*, note 12, at para. 59: “[a] claimant who otherwise has standing can generally seek a declaration of invalidity under s. 52 on the grounds that a law has unconstitutional effects either in his own case or on third parties.”

²⁷ *Nur, supra*, note 2, at para. 57.

²⁸ *Id.*, at para. 56.

²⁹ *Supra*, note 1, at paras. 16-18. The Court did not address the question of whether denying provincial courts any authority under s. 52(1) would be problematic in that it would require duplication of proceedings across multiple trial courts that were not bound by other trial decisions; would deny indigent accused persons the ability to benefit from successful s. 12 challenges raised by other defendants in other trials; or would permit the Crown to shield a law found to be unconstitutional under s. 12, and continue to apply it, by simply failing to appeal unfavourable rulings at the trial level. See Factum of the Intervener, Criminal Lawyers Association.

³⁰ *Nur, supra*, note 2, at para. 58: “...a court *may* look ... at other reasonably foreseeable situations where the impugned law may apply.” (emphasis added)

high bar” for finding cruel and unusual punishment under section 12. This supposed elevated standard is in keeping with numerous judicial pronouncements: that “[w]e should be careful not to stigmatize every disproportionate or excessive sentence as being a constitutional violation”;³¹ that hypotheticals should reflect circumstances that “could commonly arise in day-to-day life”;³² and, that any such hypothetical analyses should be based on or present facts that are “‘common’ rather than ‘extreme’ or ‘far-fetched’.”³³ Embedded in this 30-year history is a consistent deference towards Parliament’s intent and prerogative in the design and imposition of mandatory minimum sentences, one that should not be easily overcome by reference to section 12.

3. Challenging the Reasonable Hypotheticals in *Lloyd*

In *Nur*, as well as in each of its companion cases³⁴ and *Lloyd* itself, this multi-stage analysis manifested as a split result after both stages of the second part of the test had been applied. In almost every case, the mandatory minimum sentence was held to be appropriate as applied to the actual offender(s) challenging the law, whilst also being found more generally to violate section 12 under the reasonable hypothetical analysis.³⁵ In other words, statutory provisions have consistently been declared unconstitutional and of no force and effect under section 52(1) of the Constitution notwithstanding the Court’s view that no tangible person has been disadvantaged by them.

Given this disconnect between outcomes in the first and second stages of the *Nur* test, the proper construction of the reasonable hypothetical

³¹ *R. v. Smith*, [1987] S.C.J. No. 36, [1987] 1 S.C.R. 1045 at 1072, 40 D.L.R. (4th) 435 (S.C.C.) [hereinafter “*Smith*”].

³² *R. v. Goltz*, [1991] S.C.J. No. 90, [1991] 3 S.C.R. 485 at 516, 61 B.C.L.R. (2d) 145 (S.C.C.) [hereinafter “*Goltz*”].

³³ *R. v. Morrisey*, [2000] S.C.J. No. 39, 2000 SCC 39, [2000] 2 S.C.R. 90 at para. 33 (S.C.C.) [hereinafter “*Morrisey*”].

³⁴ The constitutionality of s. 95(2)(a)(i) and (ii) of the *Criminal Code*, *supra*, note 4, was challenged in *Nur*, *supra*, note 2, as well as five other cases: *R. v. Smickle*, [2013] O.J. No. 5070, 2013 ONCA 678, 304 C.C.C. (3d) 371 (Ont. C.A.) [hereinafter “*Smickle*”]; *R. v. Rocheleau*, [2013] O.J. No. 5137, 2013 ONCA 679, 311 O.A.C. 295 (Ont. C.A.); *R. v. Chambers*, [2013] O.J. No. 5116, 2013 ONCA 680, 311 O.A.C. 307 (Ont. C.A.); *R. v. Charles*, [2013] O.J. No. 5115, 2013 ONCA 681, 117 O.R. (3d) 456 (Ont. C.A.); and *R. v. Meszaros*, [2013] O.J. No. 5113, 2013 ONCA 682, 309 C.C.C. (3d) 392 (Ont. C.A.). Of the six cases, only *Smickle* was decided on the basis that the mandatory minimum was excessive as applied to Mr. Smickle himself. Overall, only *Charles* and *Nur* were granted leave to appeal; the two cases were heard together at the Supreme Court.

³⁵ One notable exception being *Smickle*, *id.*, at paras. 31-33.

takes on central importance. The requirement of reasonable foreseeability and the aversion to “marginal” or “far-fetched” all are intended to prevent the construction of reasonable hypotheticals that automatically produce grossly disproportionate sentences and therefore negate virtually every mandatory minimum: “...This excludes using personal features to construct the most innocent and sympathetic case imaginable ... the inquiry must be grounded in common sense and experience.”³⁶

At the same time, “personal characteristics cannot be entirely excluded”³⁷ from the analysis. In *Nur*, the impugned law imposed a minimum sentence of three or five years on an offender convicted of possessing prohibited loaded firearms. Mr. Nur and Mr. Charles did not benefit from the Court’s declaration of invalidity of subsection 95(2)(a)(i) and (ii) of the *Criminal Code* because they both possessed weapons in circumstances more akin to “truly criminal conduct”.³⁸ Yet the Court was concerned about the reasonably foreseeable “licensed and responsible gun owner” who improperly and unwittingly stored a licensed weapon in a manner that infringed the statute:³⁹ “...The bottom line is that s. 95(1) foreseeably catches licensing offences which involve little or no moral fault and little or no danger to the public.”⁴⁰

The decision in *Lloyd* is controversial in part because it relies on a highly specific and sympathetic accused person as part of the reasonable hypothetical, individualized beyond the generic licensed and responsible gun owner or unprepared inheritor⁴¹ envisaged in *Nur*. Two hypotheticals were relied upon to show the gross disproportionality occasioned by the law. In the first, an addict might be sentenced to the mandatory minimum of one year imprisonment for sharing a small amount of a Schedule I drug such as cocaine with a friend or spouse, nine years after receiving her only other criminal conviction for sharing marijuana at a party.⁴² Here, the minimal moral blameworthiness of sharing plays a key role in the majority’s declaration that a year in prison would be shocking to Canadians.⁴³

³⁶ *Nur*, *supra*, note 2, at para. 75. In the same paragraph, the majority warned that in the absence of such constraints, “almost any mandatory minimum could be argued to violate s. 12 and lawyerly ingenuity would be the only limit to findings of unconstitutionality.”

³⁷ *Id.*, at para. 74.

³⁸ To use the phrasing of Doherty J.A. in *R. v. Nur*, [2013] O.J. No. 5120, 2013 ONCA 677, 117 O.R. (3d) 401, at para. 51 (Ont. C.A.).

³⁹ *Nur*, *supra*, note 2, at para. 82.

⁴⁰ *Id.*, at para. 83.

⁴¹ *Id.*

⁴² *Lloyd*, *supra*, note 1, at para. 32.

⁴³ *Id.*

The second reasonable hypothetical is more involved, involving a drug addict whose activities fall closer to the professional drug dealing of a stereotypical trafficker:

...A drug addict with a prior conviction for trafficking is convicted of a second offence. In both cases, he was only trafficking in order to support his own addiction. Between conviction and the sentencing, he goes to a rehabilitation centre and conquers his addiction. He comes to the sentencing court asking for a short sentence that will allow him to resume a healthy and productive life.⁴⁴

According to the Court, imposing a one-year sentence on this vulnerable but rehabilitated offender would “shock the conscience of Canadians.”⁴⁵

The majority’s construction of hypotheticals in this case is the source of deep controversy. First, as the dissenting opinion points out, these circumstances sound very similar to that of Mr. Lloyd himself, who had already conceded that the minimum sentence was appropriate in his circumstances.⁴⁶ Mr. Lloyd was described by the sentencing judge as a low-level drug dealer who trafficked to support his own addiction. Lloyd had engaged in some nascent attempts at rehabilitation between the two relevant convictions that triggered the mandatory minimum sentence, and requested a sentence of three to four months.⁴⁷ How then could a reasonable hypothetical based on essentially the same facts lead to a finding of gross disproportionality?

Ironically, given the clear signals to Parliament to draft legislation carefully, specifically, and narrowly, the answer would seem to lie in a relatively lax approach to defining the hypothetical and distinguishing it from Lloyd himself. At the time of his arrest, Lloyd was carrying three different Schedule I drugs — cocaine, heroin, and methamphetamine. His prior conviction had been for possession of methamphetamine for the purpose of trafficking, and he had been released about one month before the arrest that exposed him to the mandatory minimum sentence. In addition, Lloyd was convicted of five further offences after this, including for several possession offences.⁴⁸ By contrast, the majority’s hypothetical tweaks the facts of Lloyd’s situation (although it does not

⁴⁴ *Id.*, at para. 33.

⁴⁵ *Id.*

⁴⁶ *Id.*, at para. 25.

⁴⁷ *R. v. Lloyd*, [2014] B.C.J. No. 274, 2014 BCPC 8, at paras. 18-22, 29-33 (B.C. Prov. Ct.).

⁴⁸ *Id.*

explicitly say so) into a more sympathetic circumstance where the offender has successfully completed a rehabilitation program (as opposed to tentatively investigated one) and presumably lacks the extensive criminal record of Lloyd.

More clarity on this point might have strengthened the utility of that example, but the two reasonable hypotheticals employed by the majority nonetheless raise valid questions about the section 12 process. Is the situation of the hypothetical drug addict so close to the facts of the instant case as to suggest that there is nothing grossly disproportionate about the sentence imposed?⁴⁹ Or, does this adjustment of the facts of *Lloyd* violate the requirement that the reasonable hypothetical be reasonably foreseeable, neither marginal nor far-fetched? For example, would the offender in that situation even receive the second conviction, the one that triggers the mandatory minimum sentence, or would he be diverted into a drug treatment program that would preclude a conviction if successfully completed?

The majority's response is that such schemes are insufficient to insulate the law from section 12 review: such programs are unavailable in most jurisdictions, and may be inaccessible even where they exist; admission usually requires a guilty plea and waiver of the right to a fair trial; such programs are onerous for heavily addicted accused; and, finally, the Crown generally retains the discretion to disqualify individuals from participation. For the majority, Crown discretion cannot operate as a constitutional protection against grossly disproportionate punishment;⁵⁰ for the dissent, relying on *Goltz*,⁵¹ where the described conduct might constitute a lesser or different offence, then it cannot constitute a reasonable hypothetical. There is no mention made here of the role of Crown discretion in charging decisions, even though presumably it is that discretion which shields the offender.

In addition, how much emphasis is to be placed on reasonable hypotheticals developed from reported cases? On this last point, the dissenting opinion argues that the first hypothetical, of the offender who shares, is not reasonable because either that offender would not suffer the first conviction (which could be construed as joint possession of

⁴⁹ *Lloyd*, *supra*, note 1, at para. 100.

⁵⁰ *Id.*, at para. 34, citing *Nur*, *supra*, note 2, at 94.

⁵¹ *Goltz*, *supra*, note 32 (deciding that a mandatory minimum sentence of seven days' imprisonment for driving with a suspended licence did not violate s. 12, and that the reasonable hypothetical posed by the respondent-offender would not arise because it is almost certain that the hypothetical accused would succeed with a defence of necessity and therefore not be convicted).

marijuana depending, one supposes, on the exercise of prosecutorial discretion), or because there are very few cases where repeat offenders have no other intervening convictions. Contrary to established cases on section 12, she would be the most sympathetic offender imaginable⁵² — presumably in part because of her awful luck.

IV. THE FUTURE OF MANDATORY MINIMUMS

For some commentators, *Lloyd* is the logical conclusion of section 12 jurisprudence and the reasonable hypothetical analysis: that the Court's warning about making it too easy to construct a sympathetic reasonable hypothetical was one that would be overtaken by the laxity that would be applied to the constraints of "far-fetched" and "marginally imaginable".⁵³ Certainly the unwillingness to find unconstitutionality on the basis of the first stage of the test might reflect the "high bar" promised in *Nur*. Yet for at least three reasons it is perhaps premature to suggest that the second stage of the test will lead to automatic eliminations of mandatory minimum sentences: judges have exhibited mixed tendencies in utilizing section 12; the Supreme Court's accumulated rulings on proportionality in the sentencing context justify precluding the consideration of factors that would ordinarily be relevant to determining a fit sentence; and, continuing judicial reluctance to adapt arguably the most powerful tool of resistance to mandatory minimum sentences, the disparate impacts generated by them not for individuals but for historically disadvantaged groups.

1. Judicial Practice

First, the actual response of the judiciary to the Court's interpretation of reasonable hypotheticals in *Lloyd* has been mixed, just as it was after *Smith* and its successor cases up to and including *Nur*. Some mandatory minimum sentences are struck down, and others are not, suggesting that

⁵² *Id.*, at paras. 89-95.

⁵³ See, e.g., Stuart, *supra*, note 13, (that post-*Lloyd* and *Nur*, "many of the 60 or mandatory minimums should fall"); W.K. Gorman, "The Death of Mandatory Minimum Periods of Imprisonment in Canada" (2016) 52:3 *Court Review* 96, at 99 ("*Nur* and *Lloyd* appear to have taken an approach that suggests mandatory minimum periods of imprisonment will be consistently declared to be unconstitutional in Canada"); and, Lincoln Caylor and Gannon G. Beaulne, *Parliamentary Restrictions on Judicial Discretion in Sentencing: A Defence of Mandatory Minimum Sentences* (Ottawa: Macdonald-Laurier Institute, 2014) at 19 (warning that "the gross disproportionality test is a discretionary analysis left in the hands of the Canadian judiciary ... it could quickly become a means through which judges can usurp Parliament's power to enact valid criminal sentences...").

lower court judges are finding a balance between Parliament's intent and the flexibility afforded by cases such as *Nur* and *Lloyd*. This should not be surprising. After all, the decision and tests outlined in *Nur* are grounded in *Smith*, *Morrissey* and *Latimer*,⁵⁴ amongst others. Only in *Smith* was the law declared unconstitutional; in the other two cases, the appellate courts overturned lower court declarations of invalidity.

While lower courts have struck down some mandatory minimums,⁵⁵ including on the basis of *Lloyd*,⁵⁶ they have preserved them in respect of other offences even as the law on reasonable hypotheticals evolved. In *Li*,⁵⁷ the court upheld the constitutionality of section 7(2)(b)(iii) of the CDSA.⁵⁸ In the post-*Lloyd* cases of *McIntyre*⁵⁹ and *McIvor*,⁶⁰ a mandatory minimum sentence of five years for armed robbery was upheld.⁶¹ In *Oud*,⁶² the British Columbia Court of Appeal overturned a lower court decision that had found section 244.2(3)(b) of the *Criminal Code*⁶³ to be unconstitutional. In that case, the appellate court explicitly used *Lloyd* as the basis for determining the provision was in fact constitutional.⁶⁴ As they have for the last several years, predictions about the floodgates of unconstitutionality findings remain unproven even after *Lloyd*.

2. Gross Disproportionality as Applied to the Accused

While it may be argued that *Lloyd* has changed prior understandings of the reasonable hypothetical for the purposes of the second stage of the section 12 analysis, *Lloyd* has not fundamentally altered the first stage of the test. Courts have regularly (but not always) failed to consider

⁵⁴ *R. v. Latimer*, [2001] S.C.J. No. 1, 2001 SCC 1, [2001] 1 S.C.R. 3 (S.C.C.) (upholding the mandatory minimum punishment for murder and refusing to allow a constitutional exemption).

⁵⁵ For pre-*Lloyd* cases, see *R. v. R. (E.R.D.)*, [2016] B.C.J. No. 774, 2016 BCSC 684 (B.C.S.C.); *R. v. Badali*, [2016] O.J. No. 544, 2016 ONSC 788 (Ont. S.C.J.); *R. v. Flaro*, [2014] O.J. No. 94, 2014 ONCJ 2 (Ont. C.J.).

⁵⁶ In *R. v. Dickey*, [2016] B.C.J. No. 815, 2016 BCCA 177, 335 C.C.C. (3d) 478 (B.C.C.A.), the Court predictably struck down s. 5(3)(a)(ii)(A) and (C) of the CDSA, which were parallel provisions to s. 5(3)(a)(ii)(D), which was ruled unconstitutional in *Lloyd*.

⁵⁷ *R. v. Li*, [2016] O.J. No. 1371, 2016 ONSC 1757 (Ont. S.C.J.).

⁵⁸ Imposing a one-year minimum for growing between 201 and 500 marijuana plants.

⁵⁹ *R. v. McIntyre*, [2017] O.J. No. 178, 2017 ONSC 360, 2017 CarswellOnt 342 (Ont. S.C.J.).

⁶⁰ *R. v. McIvor*, [2017] M.J. No. 52, 2017 MBPC 11, 2017 CarswellMan 64 (Man. Prov. Ct.) [hereinafter "*McIvor*"].

⁶¹ Under s. 344(1)(a)(i) of the *Criminal Code*, *supra*, note 4.

⁶² *R. v. Oud*, [2016] B.C.J. No. 1589, 2016 BCCA 332, 339 C.C.C. (3d) 379 (B.C.C.A.) [hereinafter "*Oud*"].

⁶³ Imposing a minimum four-year sentence for the reckless discharge of a firearm.

⁶⁴ *Oud*, *supra*, note 62, at paras. 32 *et seq.*, 43-44.

section 718.2(e) of the *Criminal Code*,⁶⁵ in their assessment of whether a mandatory minimum is grossly disproportionate in a particular case. Section 718.2(e) requires that a sentencing judge consider all measures short of incarceration when fashioning a fit sentence for an accused, paying “particular attention to the circumstances of Aboriginal offenders.”⁶⁶ The fact that the introduction of this provision did little to ameliorate the over-representation of Indigenous accused and offenders in the criminal justice system was noted by the Supreme Court in its decision in *Gladue*.⁶⁷ There, the Court described this over-representation as “a crisis in the Canadian criminal justice system”,⁶⁸ and mandated that all sentencing courts apply a new framework to Indigenous offenders in order to determine “whether an aboriginal offender will go to jail or whether other sentencing options may be employed which will play perhaps a stronger role in restoring a sense of balance to the offender, victim, and community, and in preventing future crime.”⁶⁹

Yet *Gladue* has done little to remedy the problem it was intended to address, as Indigenous rates of imprisonment have increased even as imprisonment rates for non-Indigenous offenders decline.⁷⁰ The situation that was described as a “crisis” in *Gladue* saw Indigenous adults making up 12 per cent of federal inmate admissions. By 2005, that number had risen to 17 per cent.⁷¹ In 2014 to 2015, the number was 25 per cent, even though Indigenous adults were only three per cent of the general population.⁷² A similar phenomenon can be identified with respect to African-Canadians. According to the Correctional Investigator of Canada, the federal inmate

⁶⁵ *Supra*, note 4.

⁶⁶ *Id.*

⁶⁷ *Supra*, note 5.

⁶⁸ *Id.*, at para. 64.

⁶⁹ *Id.*, at para. 65.

⁷⁰ *R. v. Ipeelee*, [2012] S.C.J. No. 13, 2012 SCC 13, [2012] 1 S.C.R. 433, at paras. 61-63 (S.C.C.) [hereinafter “*Ipeelee*”]. See also J. Rudin, “Aboriginal Over-representation and *R. v. Gladue*: Where We Were, Where We Are and Where We Might Be Going” (2008), 40 S.C.L.R. (2d) 687-713 (suggesting that the reason for this disparity is rooted in part in the lack of competence of courts and lawyers to gather appropriate information about an offender and his or her circumstances before fashioning a sentence).

⁷¹ *Ipeelee*, *id.*, at para. 62.

⁷² According to Justice Canada, 26 per cent of provincial/territorial inmates in 2014 to 2015 were Indigenous. The imbalance was more pronounced for Indigenous women, who were imprisoned at a rate 12 times that of their representation in the general population. Indigenous youth were imprisoned at a rate five times that of their representation in the general population. Youth were 37 per cent of admissions, but only seven per cent of the general population. Justice Canada – Research and Statistics Division, “Indigenous overrepresentation in the criminal justice system” (Jan. 2017), online: <<http://www.justice.gc.ca/eng/rp-pr/jr/jf-jf-pf/2017/jan02.html>>.

population grew by 10 per cent between 2005 and 2015; in that time, the African-Canadian inmate population grew by 69 per cent.⁷³

The question remains whether consideration of section 718.2(e) would make a tangible difference to some sentences. Ryan Newell⁷⁴ argues that in at least some cases, a significant disparity can be identified. In *Bouchard*,⁷⁵ an accused received a sentence of four months after a pre-sentence report and application of the *Gladue* framework; that same offence is now subject to a mandatory minimum sentence of two years.⁷⁶ It would be difficult to argue that a mandatory minimum that is five times longer than the imposed sentence is not grossly disproportionate.

Notwithstanding Parliamentary and judicial pronouncements on the importance of section 718.2(e) and *Gladue*, both frameworks are noticeably absent from the mandatory minimum sentence jurisprudence, and have been for many years.⁷⁷ There is no mention made of *Gladue* at all in *Nur*, *Lloyd*, or *Ferguson*, and section 718.2(e) is only referenced when the dissenting opinion in *Lloyd* attempts to justify the ability of mandatory minimums to override competing sentencing principles.⁷⁸ It is no surprise then that the failure to fully consider section 718.2(e) and *Gladue* is often apparent in section 12 challenges to mandatory minimum sentences. In *Bressette*,⁷⁹ Desotti J. acknowledged that his sentencing discretion had been only partially fettered by the mandatory minimum to be applied to the Indigenous offender before him. Yet he neither applied the reasonable hypothetical analysis nor considered the offender's Indigenous status in assessing the constitutionality of the provision.⁸⁰ Similar analyses took place in *Sheppard*⁸¹ and in *McIvor*,⁸² where the trial judge mentioned the Indigenous status of the offender but did not refer to it in assessing the constitutionality of the mandatory minimum sentence.

⁷³ H. Sapers, 11th Annual Report of the Correctional Investigator of Canada 2014-2015 (June 26, 2015), online: <<http://www.oci-bec.gc.ca/cnt/rpt/annrpt/annrpt20142015-eng.aspx>>.

⁷⁴ R. Newell, "Making Matters Worse: the Safe Streets and Communities Act and the Ongoing Crisis of Indigenous Over-Incarceration" (2013) 51 Osgoode Hall L.J. 199-249.

⁷⁵ *R. v. Bouchard*, [2012] O.J. No. 3131, 2012 ONCJ 425 (Ont. C.J.).

⁷⁶ Section 5(3)(a)(ii)(C) of the CDSA, *supra*, note 18, as amended by the *Safe Streets and Communities Act*, S.C. 2012, c. 1.

⁷⁷ Larry Chartrand expresses concern about some judges not addressing these concepts as early as 2001. L.N. Chartrand, "Aboriginal Peoples and Mandatory Sentencing" (2001) 39 Osgoode Hall L.J. 449-467.

⁷⁸ *Lloyd*, *supra*, note 1, at para. 103.

⁷⁹ *R. v. Bressette*, [2010] O.J. No. 3741, 2010 ONSC 3831 (Ont. S.C.J.).

⁸⁰ The judge did note that the mandatory minimum set a new floor for punishment, and that the illegal use of firearms was a danger to Indigenous communities.

⁸¹ *R. v. Sheppard*, [2011] N.J. No. 252, 241 C.R.R. (2d) 14, 2011 CanLII 41607 (N.L. Prov. Ct.).

⁸² *Supra*, note 60.

It is unclear that the assessment of these factors in any particular offender's case would lead to a finding of gross disproportionality, but it is clear that — given the desire to find appropriate non-carceral sentences that animates both section 718.2(e) and *Gladue* — those concepts tend to promote such a finding in the face of a requirement to imprison any and all offenders. In defending the ability of Parliament to introduce legislation that explicitly sought to prevent the application of other statutory and fundamental rules of sentencing, McLachlin C.J.C. declared that Parliament could balance denunciation, deterrence and other goals through mandatory minimums.⁸³

This is a slightly different position than that staked out in the dissenting opinion of Gascon J. that she joined in *Lacasse*.⁸⁴ There, the justices first reflected the reasons in *Ipeelee* that proportionality requires considering parity alongside proportionality (including the offender's degree of responsibility),⁸⁵ and then described as over-simplistic the near-automatic reversion to imprisonment when Parliament chose to emphasize denunciation and deterrence:

...In my view, the courts should not automatically assume that imprisonment is always the preferred sanction for the purpose of meeting these objectives. To do so would be contrary to other sentencing principles. Rather, a court must consider 'all available sanctions, other than imprisonment', that are reasonable in the circumstances: s. 718.2(e) *Cr. C.*; *Gladue*, at para. 36.⁸⁶

To the extent that these factors are not considered in the first branch of the section 12 test, the ability to challenge mandatory minimum sentences is weakened.

3. Personal Characteristics and Reasonable Hypotheticals after *Lloyd*

One reason that the floodgates might be seen as far from open is that not only has the Supreme Court largely neglected to take up the issue, but it has also explicitly disavowed its own comments in recent cases

⁸³ *Lloyd*, *supra*, note 1, at para. 45.

⁸⁴ *R. v. Lacasse*, [2015] S.C.J. No. 64, 2015 SCC 64, [2015] 3 S.C.R. 1089 (S.C.C.) [hereinafter "*Lacasse*"]. In fairness to the Chief Justice, Gascon J. did not acknowledge his *Lacasse* dissent either when he joined Wagner and Brown JJ. in writing the dissent in *Lloyd*.

⁸⁵ *Id.*, at para. 131 (dissenting reasons of Gascon J.).

⁸⁶ *Id.*, at para. 132.

about proportionality in sentencing. In *Ipeelee*, writing on the sentencing of two Indigenous offenders, the Court unanimously agreed⁸⁷ that the failure of a sentencing judge to take into account systemic and background factors “would violate the fundamental principle of sentencing — that the sentence must be proportionate to the gravity of the offence *and the degree of responsibility of the offender*.”⁸⁸ Writing for the majority, LeBel J. said “[p]roportionality is the *sine qua non* of a just sanction” and “could aptly be described as a principle of fundamental justice”.⁸⁹

These phrases were then adopted by the Court in its unanimous decision in *Anderson*,⁹⁰ only to be dismissed in *Lloyd* and *Safarzadeh-Markhali* on the basis that adopting proportionality under section 7 of the Charter would lead to a lower standard than that of section 12 review, and therefore subsume section 12 into section 7 for these purposes.⁹¹ This certainly raises a coherence problem, but surely it asks the wrong question. Rather than focusing on whether this is a formal disconnect between section 7 and section 12, or whether one renders the other redundant, perhaps the Court should have returned its attention to the question of whether gross disproportionality is or was ever the correct standard for section 12 review.

One consequence of insisting on gross disproportionality as the appropriate standard for constitutional review — and negating the availability of proportionality *simpliciter* — is that it excludes the ability of judges to craft sentences that consider proportionality in its full substantive sense: that connect the sentence imposed to the moral blameworthiness of the offender, and consider the appropriateness of the sentence in the context of that particular offender. Mandatory minimum sentences focus on the question of whether like offences are receiving like sentences, bypassing key components of proportionality — the offender and her circumstances — entirely, contrary to the warning of LeBel J. in *Ipeelee* that “[c]ourts must ensure that a formalistic approach to parity in sentencing does not undermine the remedial purpose of s. 718.2(e).”⁹² The emphasis on parity, and its associated prioritization of denunciation and the seriousness of the offence as

⁸⁷ Justice Rothstein dissented in part, but not on these points: *Ipeelee*, *supra*, note 70.

⁸⁸ *Id.*, at para. 73 (emphasis in original).

⁸⁹ *Id.*, at paras. 37 and 36.

⁹⁰ *R. v. Anderson*, [2014] S.C.J. No. 41, 2014 SCC 41, [2014] 2 S.C.R. 167, at para. 21 (S.C.C.). In that case, the Court rejected the idea that proportionality required not just judges but also the Crown to consider *Gladue* principles.

⁹¹ *Lloyd*, *supra*, note 1, at paras. 40-42.

⁹² *Ipeelee*, *supra*, note 70, at para. 79.

near-determinative factors undermines the substantive equality-generating provisions of both section 718.2(e) and *Gladue*.

As noted above, this exclusion often appears in the first stage of the section 12 test, but it also reproduces itself in the design of reasonable hypotheticals under the second branch. In none of its section 12 reasonable hypothetical jurisprudence has the Court considered Indigenous status or race or any other sort of historical disadvantage that might be relevant in the ordinary sentencing analysis. In *Nur*, Doherty J.A. writing for a panel of five judges at the Ontario Court of Appeal, dismissed the section 15 argument in one paragraph by adopting the trial judge's reasons on the point.⁹³

The argument of Code J. at trial in *Nur* was essentially that there was no section 15 claim to be made because the law itself was facially neutral and did not cause the disproportionate application of the law to Black males.⁹⁴ From this view, the application of the law being discriminatory says nothing about whether the law itself needs to be remedied. Without going into the merits of this position as a section 15 argument, it is important to note that causation has little role to play in section 718.2(e) and *Gladue* arguments about proportionality in sentencing.⁹⁵ There, the fact of over-representation is the crisis to be ameliorated,⁹⁶ and the appropriate sentence for the individual is contextualized by her experiences as a member of a particular over-represented community and her associated historical disadvantage.⁹⁷ *Ipeelee* was a concerted reminder to sentencing judges that section 718.2(e) needs to be considered in all cases, especially those involving Indigenous offenders, even when the offence is serious.⁹⁸ Regardless of the state of the law on section 15, section 12 is agnostic as to the cause of the disproportionate effect; it is concerned only with the ability of the sentencing judge to provide some remedy through crafting a fully proportionate sentence.⁹⁹

⁹³ *R. v. Nur*, [2013] O.J. No. 5120, 2013 ONCA 677, 117 O.R. (3d) 401, at para. 182 (Ont. C.A.): "I agree with the analysis and conclusion of the trial judge at paras. 74-82. There is no breach of s. 15."

⁹⁴ *R. v. Nur*, [2011] O.J. No. 3878, 2011 ONSC 4874, 275 C.C.C. (3d) 330, at paras. 78-79 (Ont. S.C.J.) [hereinafter "*Nur* (S.C.J.)"].

⁹⁵ *Gladue*, *supra*, note 5, at para. 65; *Ipeelee*, *supra*, note 70, at para. 61.

⁹⁶ *Ipeelee*, *supra*, note 70, at para. 56.

⁹⁷ *Id.*, at para. 60.

⁹⁸ *Id.*, at paras. 85-87 (referring to the "unwarranted emphasis" placed on the Court's statement in *Gladue* that there is less likely to be a sentence adjustment when the conviction is for a serious crime).

⁹⁹ See also J. Rudin and K. Roach, "Broken Promises: A Response to Stenning and Roberts' 'Empty Promises'" (2002), 65 Sask. L. Rev. 3-34 (that it would be illogical to argue that s. 718.2(e) can only be effective to the extent that sentencing practices cause the over-representation to be remedied).

To the extent that mandatory minimums exclude the consideration of these factors — and to be clear, minimum sentences make non-custodial sentences statutorily impermissible — then the fundamental principle of proportionality is clearly violated.

The explanation of how proportionality has become diluted for the purposes of section 12 is a multi-faceted one. Jamie Cameron is right to point out that the turn to section 7 as a means of asserting substantive and not merely procedural rights set the stage for weakening other substantive rights and denying them the robust application they otherwise ought to have developed.¹⁰⁰ Yet the diminution of proportionality is also the product of several other forces that in large part originate with a Court that has not only acquiesced to Parliamentary assertiveness that reduces judicial discretion in sentencing by making some features of proportionality inaccessible but also actively enabled that circumscription.

The first of these features is in some ways the most contested in the context of mandatory minimum sentences. Notwithstanding that several mandatory minimums have been declared unconstitutional, the Supreme Court has arguably been overly deferential to Parliament in its imposition of mandatory minimum sentences. At no point has the Court declared that mandatory minimum sentences are inherently problematic because they conflict with fundamental sentencing principles. Rather, the Court has gone out of its way to advise Parliament on how to better craft mandatory minimums in order to protect them from constitutional review. To be fair, advising Parliament on the constitutionality of legislation is part of the Court's job, but as part of this the Court has also declared that Parliament has the general power to fetter judicial discretion through minimum sentences.

Second, this erosion of judicial discretion has been enabled by judicial pronouncements on the scope and strength of proportionality as a foundational concept of sentencing. This extends beyond the decision to anoint gross disproportionality as the constitutional standard for section 12 review, and includes the retrenchment from ordinary principles of sentencing review. In *R. v. M. (C.A.)* and a number of subsequent cases spanning nearly two decades, the Court averred that errors in principle could justify judicial review of a lower court's sentencing determination even in the absence of evidence that the sentence itself was demonstrably

¹⁰⁰ J. Cameron, "Fault and Punishment under Sections 7 and 12 of the Charter" (2008), 40 S.C.L.R. (2d) 553-592.

unfit.¹⁰¹ This confirmed the importance of not only the ultimate penalty itself when determining the propriety of a sentence, but the importance of ensuring that all relevant factors were taken into consideration when that penalty was being shaped; this is proportionality in its fullest sense.

However, there has been a clear retreat from this position in recent times, most notably in *Lacasse*. In that case, the dissenting opinion of McLachlin C.J.C. and Gascon J. reiterated the *M. (C.A.)* principle,¹⁰² but was overridden by Wagner J.'s declaration that intervention was only justified if the error in principle or failure to consider relevant factors would have had affected the ultimate sentence.¹⁰³ Here, the Court takes an important step towards subordinating the right process of determining a sentence. This includes by implication the failure to attend to section 718.2(e). The difficulty is assessing how such a failure impacts on the final disposition when central features are unknown to the sentencing judge, and are unobtainable by the reviewing court that is forced to assess fitness based on a limited record. The wealth of information that goes into an appropriate *Gladue* report, for example, would seem profoundly important to determining if the ultimate disposition is an appropriate one. Being able to intervene even where it is not apparent on its face that the sentence is itself out of line takes on renewed importance in such circumstances. By moving away from a robust enforcement of sentencing principles in a holistic sense, the Court validates Parliamentary processes that formally preclude holistic and individualized sentencing.

Finally, the Court participates in Parliamentary depredation of proportionality under section 12 through the very tangible ways in which it constructs reasonable hypotheticals. One of the curious features of *Lloyd* is that it presents a very personalized offender in its second hypothetical involving a rehabilitated drug addict. This is curious because of the lack of attention otherwise paid to similar circumstances in other cases, particularly *Nur*. In *Nur*, Code J. not only failed to account for the accused's status as a young Black man charged with an offence for which African-Canadians were disproportionately charged in

¹⁰¹ [1996] S.C.J. No. 28, [1996] 1 S.C.R. 500, 105 C.C.C. (3d) 327, at para. 90 (S.C.C.). See also, *R. v. McDonnell*, [1997] S.C.J. No. 42, [1997] 1 S.C.R. 948, 145 D.L.R. (4th) 577, at para. 17 (S.C.C.); *R. v. L.M.*, [2008] S.C.J. No. 31, 2008 SCC 31, [2008] 2 S.C.R. 163, at paras. 14-15 (S.C.C.); and *R. v. Nasogalauk*, [2010] S.C.J. No. 6, 2010 SCC 6, [2010] 1 S.C.R. 206, at para. 46 (S.C.C.).

¹⁰² *Supra*, note 84, at paras. 135-143.

¹⁰³ *Id.*, at para. 43.

Toronto,¹⁰⁴ he also justified his dismissal of this feature on the basis that it could apply broadly to challenge a range of criminal laws:

The s. 15 arguments advanced by the Applicant and the Intervener could be made in relation to any provision of the *Criminal Code* that results in mandatory imprisonment, for example, the sentence for the offence of murder. If disproportionate numbers of blacks are charged with murder because of the discriminatory impact of poverty, unemployment, poor housing and biased law enforcement decisions, would it be appropriate to strike down the mandatory minimum penalty for murder? Obviously not.¹⁰⁵

With respect, Code J.'s analogy between drug and gun possession offences on the one hand, and murder on the other, seems to unfairly stretch the applicant's section 15 arguments in *Nur*, especially given that *Gladue* had already suggested that in the context of sentencing, the violence of the offence points towards a higher sentence.

More importantly, it is not clear why these systemic and background factors would not be relevant for the purposes of section 12 (assuming they are not relevant for section 15). If anything, the opposite conclusion to that of Code J. ought to be reached — that mandatory minimums are in need of revision if they contribute to and exacerbate gross over-representation for both African-Canadian and Indigenous persons.¹⁰⁶ In *Borde*, for example, the Ontario Court of Appeal suggested that the African-Canadian accused might be able to make *Gladue* arguments on the basis of similar systemic and background factors to Indigenous offenders.¹⁰⁷

Of telling relevance is the manner in which the hypothetical in *Nur* was constructed, and the way in which Nur's own personal factors were not taken into account. In *Nur*, the Court ruled the provision unconstitutional because it might capture relatively innocent licensing offences — a conscientious, responsible gun owner who makes an error as to the statutory requirements for the proper storage of his licensed, legal firearm. It would be grossly disproportionate to his blameworthiness

¹⁰⁴ Faced with evidence that approximately 62 per cent of s. 95 charges were laid against African-Canadians even though they made up only 8.4 per cent of the population, Code J. did acknowledge that the evidence before him showed "undoubtedly [that] a disproportionately high number" of African-Canadians were charged. *Nur* (S.C.J.), *supra*, note 94, at paras. 76-77.

¹⁰⁵ *Id.*, at para. 80.

¹⁰⁶ See notes 70-73, above.

¹⁰⁷ *R. v. Borde*, [2003] O.J. No. 354, 63 O.R. (3d) 417, 2003 CanLII 4187, at para. 27 (Ont. C.A.). See also *R. v. Hamilton*, [2003] O.J. No. 532, 172 C.C.C. (3d) 114, 8 C.R. (6th) 215 (Ont. S.C.J.), *aff'd* [2004] O.J. No. 3252, 72 O.R. (3d) 1, 186 C.C.C. (3d) 129 (Ont. C.A.).

if failing to properly lock an ammunition box could lead to a three-year sentence of imprisonment for this offender.

Left unsaid was that the “reasonable hypothetical” that the Court drew upon was no hypothetical. It was based, as the dissenting judges noted, on the actual case of John Snobelen, the former Minister of Education and then-Natural Resources Minister of Ontario. Snobelen was brought to the attention of police when his ex-wife noted the existence of an unlicensed firearm that was shipped to his Canadian home from his 212-acre ranch in Oklahoma. Snobelen had sold his ranch, forgotten about the gun that was there when it was shipped, and then forgotten to dispose of it once he received it in Canada. He was charged with a summary offence, pleaded guilty under the provision and provided character references, with reference also made to his public service; he ultimately received an absolute discharge.¹⁰⁸

This hypothetical, stripped of its context and history, abstracted and re-presented as a neutral construct, formed the basis of the section 12 violation in *Nur*. Yet no regard was given to the seemingly relevant circumstances of Nur himself: a 19-year old refugee from Somalia; who lived in an overcrowded townhouse with his parents and eight siblings; who escaped a war and, from the time he was six, lived in one of Toronto’s most notoriously crime-ridden neighbourhoods where he nonetheless excelled; described by a teacher as “an exceptional student and athlete who excelled in the classroom and on the basketball court ... an incredible youth with unlimited academic and great leadership skills”; and, described by his employer as “professional, punctual, creative ... [with] role model characteristics”; with no criminal record, and no indication as to how he came to possess the gun he was found with;¹⁰⁹ and no recognition that for the particular offence he was eventually charged with, there was clear evidence of disproportionate charging of Blacks.

None of this is to say that Snobelen and Nur are equivalent individuals enmeshed in equivalent circumstances, only that the idea that one’s case constitutes a reasonable hypothetical and another one does not is a matter in need of greater justification. Yet none has been forthcoming from the Court on this point about how to personalize the characteristics

¹⁰⁸ *R. v. Snobelen*, [2008] O.J. No. 6021 (Ont. C.J.).

¹⁰⁹ Justice Code further noted that the Crown had not proven if Nur possessed the gun before he arrived at the site of his arrest, when he joined a group of young men outside the site of his arrest, or if he participated in any of the threatening acts of those other young men present at the time (and which had precipitated a call to the police). *Nur* (S.C.J.), *supra*, note 94, at paras. 34, 61.

of the offender in the reasonable hypothetical. As noted above, the Court has yet to develop a hypothetical that takes into account the Indigenous or racialized identity of the offender. Having acknowledged in *Nur* the need to admit some personal characteristics of the hypothetical offender as long as they did not produce remote or far-fetched examples,¹¹⁰ the majority in *Lloyd* eschewed the opportunity to clarify this central question. Indeed, the majority in *Lloyd* made no reference to personal characteristics even as it mapped out the life of a hypothetical drug addicted dealer who rehabilitated himself.

It is of interest that no majority of the Court has ever included race or Indigenous status as a part of the reasonable hypothetical in spite of proven over-representation patterns. Speaking generously, only twice has race been referenced in the Court's reasonable hypothetical opinions, and on both of those occasions it was the dissenting justices who raised the issue. First in *Nur*, race was implicitly raised where the dissenting judges pointed to the actual history of the *Snobelen* case on which the majority's hypothetical was based.¹¹¹ As noted above, the race and class differences between *Snobelen* and *Nur* are readily apparent, even if they are unacknowledged by the Court. The second and explicit notation of race was in *Lloyd*, where the dissenting opinion referred to intervenor submissions that developed hypotheticals based on race, indigeneity, drug addiction and the unique experience of female offenders. Echoing Code J.'s remarks in the trial decision, the dissenting justices cautioned against allowing those characteristics to "overwhelm the analysis".¹¹² In this way, the continuing lack of acknowledgement of the race of actual offenders in section 12 cases, and the ongoing construction of reasonable hypotheticals that lack any racial identity, constitute further examples of the erasure of race (and differentiated experiences based on race) from the criminal justice system.¹¹³

Critics of this argument may well respond that it seems churlish to criticize the Court on this point given that ultimately the mandatory minimums in both *Nur* and *Lloyd* were ruled unconstitutional. It may be that, aware of the tiresome rhetoric about judicial activism and interference with Parliamentary intent, the Court found it unnecessary to turn to more controversial personal characteristics that veer too close to section 15 grounds in order to achieve the same result.

¹¹⁰ *Nur*, *supra*, note 2, at para. 73 *et seq.*

¹¹¹ *Id.*, at para. 127 (dissenting reasons of Moldaver J.).

¹¹² *Lloyd*, *supra*, note 1, at paras. 101-103.

¹¹³ B.L. Berger, "Race and Erasure in *R v Mann*" (2004) 21 *Criminal Reports* (6th) 58.

While this is a plausible argument, the Court's decision is neither neutral nor consequence-free. First, avoiding the question of race in section 12 also avoids addressing the question of disparate impacts under section 15 that have been the subject of much recent criticism.¹¹⁴ Intentional or not, the failure to consider racialized and gendered hypotheticals or to fully consider the race of the actual accused in assessing the constitutionality of the provision under the first branch of the section 12 test has the ancillary benefit of not revitalizing or contradicting what appears to be a rather moribund state of affairs in adverse effects litigation.

Erasing the race (among other potentially relevant grounds such as gender or even socio-economic class) of the hypothetical offender reflects the broader tendencies of the legal system to ignore or justify its discriminatory effects by first abstracting away from the particular wrinkles of the specific offender it judges, and then re-examining that bereft persona in light of the neutral, universal reasonable person that McLachlin J. envisaged in *Creighton*.¹¹⁵ Once diluted into their platonic form, individual offenders become bystanders to the subsequent legal analysis that purports to consider the reasonableness of their behaviour. Accused persons become holograms at their own trials, present but flickering as they are necessarily denuded of substance in order to enable a pseudo-scientific process of reasonability examinations.

That process is pseudo-scientific because the justification for erasure of individual characteristics in constructing the reasonable person is that it allows for a meaningfully objective standard to be derived. Yet contrary to McLachlin J.'s formulation, the reasonable person often "bears the characteristics of the dominant classes in the community and so tacitly entrenches the privileges of that class in criminal law doctrine."¹¹⁶ The question of reasonableness is implicitly subjectivized through the infusion of the particular views of the judge(s) at hand,¹¹⁷ a

¹¹⁴ See, e.g., J. Watson-Hamilton & J. Koshan, "Adverse Impact: The Supreme Court's Approach to Adverse Effects Discrimination Under Section 15 of the Charter" (2014), 19:2 *Review of Constitutional Studies* 191; and R. Cairns Way, "An Opportunity for Equality: *Kokopenace* and *Nur* at the Supreme Court of Canada" (2014) 61 *Crim. L.Q.* 465.

¹¹⁵ Justice McLachlin (as she then was) described this process in *R. v. Creighton*, [1993] S.C.J. No. 91, [1993] 3 S.C.R. 3, 105 D.L.R. (4th) 632, at para. 63 (S.C.C.).

¹¹⁶ D. Young, "Claims for Recognition and the Generalized Other: The Reasonable Person and Judgment in Criminal Law" (2008) 23 *C.J.L.S.* 15, at 23-24 [hereinafter "Young"].

¹¹⁷ M.-È. Sylvestre, "The Redistributive Potential of Section 7 of the Charter: Incorporating Socio-Economic Context in Criminal Law and in the Adjudication of Rights" (2010-2011) 42 *Ottawa L. Rev.* 389-409, at 394.

fear recognized in the Supreme Court.¹¹⁸ The reasonable person remains an equally subjective concept, albeit one usually constructed as the amalgam of a specific constellation of gendered, racialized, and socio-economic experiences: the “default characteristics” of the reasonable person are those of a privileged white man.¹¹⁹ While this has begun to change in some specific contexts of the law,¹²⁰ the reasonable person concept arguably has become justificatory in nature — “a vehicle for expressing the ultimate judicial point of view, rather than for questioning it.”¹²¹ Section 12 jurisprudence, however, remains relatively untroubled by such considerations as the actual experience of the actual offenders facing the punishment in question and — as seen in the Court’s reliance on the case of John Snobelen in *Nur* — at times explicitly and actively adopts the “default characteristics” of the middle class white male.

Second, the Court’s lack of reference to race, for example, does not mean race is absent from its decision. The dissents in both *Nur* and *Lloyd* point out the racialized dynamics of the decisions by identifying a wealthy, White middle-aged male politician turned rancher as the source of one of the hypotheticals, and explicitly rejecting African-Canadian, Indigenous, and female experiences as overwhelming and irrelevant to the analysis. In the minority’s view, the normal, non-overwhelming category that should be the starting point for section 12 is a highly specific and highly racialized one of a White man. The majority’s failure to mention race in either of these cases or even address the implications of the minority position on these issues inadvertently whitewashes the systemic racism of the criminal justice system from consideration under section 12. That the dissent and majority in *Lloyd* argue over whether including drug addiction and treatment in the construction of a reasonable hypothetical is “far-fetched” or “remote” but implicitly (in the case of the majority) and explicitly (in the case of the dissent) refuse to

¹¹⁸ In her dissenting judgment in *Egan v. Canada*, [1995] S.C.J. No. 43, [1995] 2 S.C.R. 513, at 546, 124 D.L.R. (4th) 609 (S.C.C.), L’Heureux-Dubé J. warns of the futility of relying on the “reasonable, secular, able-bodied white male”.

¹¹⁹ M. Moran, “The Reasonable Person: A Conceptual Biography in Comparative Perspective”, 14 *Lewis & Clark L. Rev.* 1233 at 1276 (2010) [hereinafter “Moran”]: “The gist of the worry is that without modification of his imputed or default characteristics, the reasonable person is presumptively male, white, able-bodied, literate and the like.”

¹²⁰ See, e.g., Young, *supra*, note 116, examining *R. v. M.L.B.*, [2004] S.J. No 755 (Sask. Prov. Ct.); *R. v. Lavallee*, [1990] S.C.J. No. 36, [1990] 1 S.C.R. 852, 55 C.C.C. (3d) 97 (S.C.C.) and *R. v. McConnell*, [1996] S.C.J. No. 51, [1996] 1 S.C.R. 1075, 48 C.R. (4th) 199 (S.C.C.).

¹²¹ Moran, *supra*, note 119, at 1278. Moran further notes, at 1281, that in equality and discrimination claims, the reasonable person standard is more likely to undermine substantive equality goals.

admit race into the analysis suggests the Court going to great lengths to avoid commenting on the elephant in the room: the well-documented over-policing and over-representation of racial minorities in Canada.

In such a context, there ought to be nothing remote or far-fetched about including race in the construction of a reasonable hypothetical, particularly given the admonitions in section 12 cases to focus on situations that “commonly arise in day-to-day” situations¹²² and that are based on reported cases as a starting point to which “additional circumstances can be added”.¹²³ Justice Code was presented with exactly this possibility in *Nur*, when given evidence that the offence *Nur* was charged with was one that in his community of Toronto was overwhelmingly charged against African-Canadians. Yet both Code J. and the Supreme Court go out of their way to avoid race in the section 12 argumentation. Similarly, in *Lloyd*, the minority complains in part that plugging “addiction” in as a feature of the accused in the hypothetical is unfair, even though *Lloyd* himself was recognized as a drug addict. Indeed, given the nature of controlled substances and drugs, and the rationale for their control, there ought to be little surprising about the idea that many drug users and traffickers are also drug addicts. While it is a limited step, the Court’s inclusion of addiction as a characteristic of the individual in *Lloyd* is an important step even if it is translated into the context of a redemption narrative.

As noted above, it is possible that the Court might see the inclusion of race or addiction or indigeneity as unnecessarily “stacking the deck” in favour of finding sentencing provisions unconstitutional. Yet if the Court’s concern is about presenting neutral hypotheticals to test the constitutional boundaries of sentencing provisions, surely there is nothing more neutral than the cases that police and Crown choose to pursue. Judicial design of an example makes that hypothetical vulnerable to attacks that the judge has tainted the example in a way that favours his or her ultimate view on the impugned law. Reliance on actual cases that are chosen initially by law enforcement agents and prosecutors sheds this complaint, and judges concerned with neutrality ought to draw their examples from specific cases. In many instances, given the over-policing of particular communities, this will lead to the entirely defensible inclusion of race and/or indigeneity (and perhaps even gender and class) in the hypothetical.

¹²² *Goltz, supra*, note 32, at para. 69.

¹²³ *Morrisey, supra*, note 33, at paras. 30-33.

When the inclusion of such factors is based on actual cases, the resultant hypothetical is much less vulnerable to critique. As it stands, the reluctance to include these factors doubly punishes offenders. At the front-end of the criminal process, these individuals are disproportionately likely to be investigated and charged for some offences. At the back-end however, post-conviction, they cannot rely on the fact of that disproportionate attention when reasonable hypotheticals are being designed. Explaining to the Black or Indigenous offender that her race is not to be considered because it would be favourable to her would be hard to reconcile with the experience of many minorities caught up in the criminal justice system. Of course, from the point of view of the offender, the logic becomes sadly coherent if it is explained that her blackness or indigeneity are not considered because it might lead to less punishment for her.

Finally, the avoidance of race in the design of reasonable hypotheticals has powerful implications for the continued viability of mandatory minimum sentences and other potential constitutional challenges. There first is a risk that the lack of recognition of race in section 12 analyses to date will lead to the same result with respect to the exercise of statutory exemptions if and when they are incorporated into the *Criminal Code*. In addition, the effect of avoiding the question of race has been to prolong the lifespan of mandatory minimum sentences. In their declaration that including race would “overwhelm the analysis”, the dissent in *Lloyd* echoed the comments of Code J. in *Nur*. There, in the context of a section 15 argument, Code J. acknowledged that the fact of widespread discriminatory enforcement of the criminal law would render virtually every mandatory imprisonment provision unconstitutional. Unacknowledged in the section 12 jurisprudence is this background concern that the inclusion of race in a reasonable hypothetical would have catastrophic effects on the continuation of mandatory minimum sentences, far more than that contemplated by *Lloyd* as it currently stands. It is a Kafkaesque condition that prevents the acknowledgement of race in a manner that might favour the offender precisely because of the otherwise pervasive emphasis on race that discriminates against and harms those same individuals elsewhere in the criminal justice process.

V. CONCLUSION

What remains most remarkable about *Lloyd* is not how much it changes, but how much it leaves relatively unaltered. At one end, the various

predictions that no mandatory minimums can withstand scrutiny under the section 12 application seem premature and even wilfully blind to the pragmatism that continues to infuse section 12 and Charter jurisprudence in respect of a range of other rights (primarily section 8 and section 10) when those rights are implicated in the context of criminal law.

Yet even if some mandatory minimum sentences continue to fall, many will remain and a number have been upheld even after *Lloyd*. The new rules about personal characteristics in reasonable hypotheticals offer some greater leeway perhaps, but little guidance. And, while *Lloyd* injected some degree of personalization into the imagined offender caught in the reasonable hypothetical in that case, neither *Lloyd* nor *Nur* nor any other cases have consistently engaged with the idea that mandatory minimum sentences might have a grossly disproportionate impact on offenders who are members of historically disadvantaged groups and for whom, as a result of their membership in such groups, mandatory minimum sentences might be grossly disproportionate.

Moreover, the normative foundation for this ongoing omission lies in part in the concept of Parliamentary sovereignty, but is also being developed by the Court in adjacent areas of the law — in establishing the standard of review for sentences, in adjudicating disparate impacts cases under section 15, and in subordinating a substantive equality-infused notion of proportionality to a more formalist notion.

What is most remarkable is that in its desire to avoid constructing the most sympathetic counter-example for section 12 purposes — even where doing so would reflect the common day-to-day experiences of many offenders — the Court effectively treats hypothetical accused with greater empathy and compassion, and arguably does a better job of recognizing the intersectional realities of their hypothetical experiences, than it does the offenders actually before them.

